
A BILL FOR AN ACT

RELATING TO PROCUREMENT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The legislature finds that contracts for public
2 works often include a duty to defend clause, requiring the
3 contractor to defend governmental entities before the
4 contractor's negligence or fault is determined.

5 Designing and constructing public works projects are unique
6 among services procured by the government. Public agencies have
7 a strong involvement in budgeting and scoping services and
8 working in collaboration with the contractor. Public works
9 often involve large risks due to site circumstances, public
10 environmental concerns, and high public usage. Highways and
11 public buildings have necessarily long service lives relative to
12 other services procured, thereby increasing contractor risk
13 beyond that of other government contracts.

14 Design professionals licensed under chapter 464, Hawaii
15 Revised Statutes, are able to obtain professional liability
16 insurance that covers the contractor for indemnifying the
17 government. However, the insurance industry does not provide
18 reasonable coverage for another party's defense costs if the



1 design professional is not negligent. Thus, the legislature
2 finds that design professional contractors should not be
3 burdened with the duty to defend a governmental body before the
4 contractor's negligence or fault is determined.

5 The legislature further finds that requiring a construction
6 contractor licensed under chapter 444, Hawaii Revised Statutes,
7 to defend the public agency beyond the owner's acceptance of the
8 project and a reasonable contractor's warranty period is overly
9 burdensome. Thus, any contractual requirement to defend the
10 governmental body by a construction contractor should be limited
11 to the construction and warranty period up to a maximum of one
12 year after final acceptance. Upon determination of negligence
13 or fault, the contractor may still be required to indemnify and
14 hold harmless the governmental body from claims arising out of
15 or resulting from the negligent, reckless, or wrongful acts,
16 errors, or omissions of the contractor.

17 The legislature further finds that, while some state and
18 county agencies recognize the negative implications and have
19 removed the duty to defend clause from contracts for public
20 works, inconsistencies between agencies and departments still
21 exist. A duty to defend clause is detrimental in the long term



1 because such clauses negatively affect competition for contracts
2 and innovation.

3 The purpose of this Act is to standardize differing
4 contract conditions regarding the duty to defend clause by
5 prohibiting defense clauses in contracts entered into by persons
6 licensed under chapter 464, Hawaii Revised Statutes, and to
7 provide certain limits on the duty to defend for persons
8 licensed under chapter 444, Hawaii Revised Statutes.

9 SECTION 2. Section 103D-713, Hawaii Revised Statutes, is
10 amended to read as follows:

11 "~~§~~**§103D-713** **Defense of a governmental body.** (a)
12 ~~[No]~~ Beginning on July 1, 2014, no contract ~~[of less than~~
13 ~~\$1,000,000]~~ that is entered into ~~[on or after July 1, 2007,]~~ by
14 any governmental body~~[, and is exclusively for services that may~~
15 ~~only lawfully be provided by]~~ with a person licensed under
16 chapter 464, ~~[may]~~ shall require the contractor to defend the
17 governmental body, or its officers, employees, or agents, from
18 any liability, damage, loss, or claim, action, or proceeding
19 arising out of the contractor's performance under the contract.

20 (b) Beginning July 1, 2014, the requirement for a person
21 licensed under chapter 444 to defend the governmental body, or
22 its officers, employees, or agents, from any liability, damage,



1 loss, or claim, action, or proceeding arising out of the
2 contractor's performance under, or any subcontractor's
3 performance pursuant to, the contract shall not extend beyond
4 the owner's final acceptance of the project and the contractor's
5 warranty period up to a minimum of one year after final
6 acceptance.

7 ~~[(b)]~~ (c) ~~[Subsection]~~ Subsections (a) and (b)
8 notwithstanding, the contract may require the contractor
9 providing the services to indemnify and hold harmless the
10 governmental body and its officers, employees, and agents from
11 and against any liability, damage, loss, cost, and expense,
12 including reasonable attorneys' fees, and all claims, suits, and
13 demands therefor arising out of or resulting from the negligent,
14 reckless, intentional, or wrongful acts, errors, or omissions of
15 the contractor, the contractor's employees, officers, agents, or
16 subcontractors in the performance of the contract or the
17 contractor's professional services, and the provisions may
18 remain in full force and effect notwithstanding the expiration
19 or early termination of the contract.

20 ~~[(e)]~~ (d) No person licensed under chapter 464 that has
21 agreed in any contract to defend a governmental body, including
22 those contracts entered into before or after July 1, 2007, shall



1 be required to defend the governmental body in a lawsuit filed
2 more than ten years beyond the [~~substantial completion~~] owner's
3 final acceptance of the project, except that this subsection
4 shall not apply to any lawsuit that has been filed prior to
5 July 1, 2007.

6 [~~(d)~~] (e) As used in this section, "person" means any
7 person, partnership, corporation, or other entity conducting
8 business in the State."

9 SECTION 3. Statutory material to be repealed is bracketed
10 and stricken. New statutory material is underscored.

11 SECTION 4. This Act shall take effect on July 1, 2014.



Report Title:

Procurement Contracts; Liability; Duty to Defend; Public Works;
Design Professionals; Licensed Contractors

Description:

Prohibits any contract that is entered into by any governmental body with a person licensed under chapter 464, Hawaii Revised Statutes, from requiring the contractor to defend the governmental body from claims arising out of the contractor's performance under the contract. Provides that the requirement for persons licensed under chapter 444, Hawaii Revised Statutes, to defend a governmental body from claims arising out of the contractor's performance under, or any subcontractor's performance pursuant to, the contract shall not extend beyond the owner's final acceptance of the project and the contractor's warranty period up to a minimum of one year after final acceptance. (SD2)

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